No. 21983

In the

United States Court of Appeal

For the Ninth Circuit

EVERT L. HAGAN,
Appellant,

vs.

THE STATE OF CALIFORNIA et al.,
Appellees,

Appellant's Closing Brief

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I

ANSWER TO APPELLEES' POINT I

Appellees refer to the fact that Commissioner Boisvert had ruled on October 21, 1963, (prior to the events complained of herein) on a motion of appellant for an order granting leave to file a cross-complaint. Appellees then state that Commissioner Boisvert ruled on a "contested issue of law" and that Hagan's attempt to disqualify Commissioner Boisvert on November 22, 1963, was "not timely made" under the authority of *Schwartzman v. Superior Court,* 231 Cal. App. 2d 195, 200. Appellees assume that the ruling of October 21, 1963, was a ruling on a "contested issue of law" but they cite no authorities to support their assumption.

California Code of Civil Procedure, Section 589, says:

> "An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof."

Section 590, of the same code provides:

> "An issue of fact arises:
>
> 1. Upon a material allegation in the complaint controverted by the answer; and
>
> 2. Upon new matters in the answer, except an issue of law is joined thereon."

And Section 588 of the same code states that:

> "Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are two kinds:
>
> 1. Of law; and
>
> 2. Of fact."

It would appear from the above sections, that a ruling on whether or not leave should be granted to file a cross-complaint contested is not a ruling on a contested issue of law or fact, but is merely a matter of procedure.

Rules 211 and 212, California Rules of Court, set out in detail the acts that a judge may do at a pre-trial conference, and 216 of the same rules gives the pre-trial

conference judge a continuing jurisdiction as to a motion or attempt to modify the pre-trial conference order.

THERE IS NOTHING WHATEVER TO BE FOUND IN RULE 212 THAT GIVES THE PRE-TRIAL CONFERENCE JUDGE ANY JURISDICTION TO MAKE A RULING UPON A CONTESTED ISSUE OF LAW OR FACT EXCEPT UPON STIPULATION OF THE PARTIES, AND TO DETERMINE THE COURT'S JURISDICTION OF THE CASE.

Under Section 1 of Rule 212, the judge may consider and act upon the written statements of legal and factual contentions; what acts he may do or may not do are not clearly specified. These are not material since the point at issue here is whether Commissioner Boisvert had the right to rule upon the right to file a cross-complaint, which is not a document set forth in Rule 210 of the same rules.

Section 2, of Rule 212, gives the pre-trial judge the right to consider and act upon *amendment* to the pleadings proposed at the time of the pre-trial hearing; this is procedural, and not a ruling upon a contested issue of law or fact.

In fact, under Rule 212, (1), the only ruling of law that the pre-trial judge can make is whether or not the court has jurisdiction in the matter. Beyond that the only act that the pre-trial judge can do is to do a ministerial act.

Other than the somewhat ambiguous provisions of Section 1, of Rule 212, relating to the usual pre-trial conference statements, to repeat, the pre-trial judge cannot act, except by stipulation, other than in a ministerial fashion to aid in the disposition of the matter.

It is further to be noted, that throughout all of the California Rules having to do with or relating to the pre-trial conference in order to emphasize the fact that this is an informal proceeding, having to do only with acts to aid the disposition of the matter at trial, the rules use the word "conference," and not "trial," "hearing" or any similar word commonly used to designate a time at which a ruling on the merits of the matter would be made.

There having been no ruling on a contested issue of law or fact, then, the rule set out in *Schwartzman v. Superior Court,* 231 Cal. App. 2d 195, 200 is controlling and the motion to disqualify Commissioner Boisvert was therefore timely.

II

ANSWER TO APPELLEES' POINT II.

A contempt proceeding is not a civil action either in law or equity, but is a separate proceeding of a criminal nature and summary character in which the Court exercises but a limited jurisdiction.

In Re Chapman, 141 Cal. App. 2d 387, 295, Pac. 2d, 573;

Phillips v. Superior Court, 22 Cal. 2d, 256, 137 Pac. 2d 838;

Hotaling v. Superior Court, 191 Cal. 501, 217 Pac. 73, 29 A.L.R. 127;

Bailey v. Superior Court, 142 Cal. App. 2d 47, 53; 279 Pac. 2d 795;

Warner v. Superior Court, 126 Cal. App. 2d 821-826; 273 Pac. 2d 89.

In *Chapman, supra,* a wife obtained a default divorce and was awarded custody of the children. Thereafter, on application of the husband, the Court modified the divorce decree and awarded custody of the children to the husband and ordered the wife to deliver the children to the husband. This order was made by one Francis A. Cochran, sitting as a judge pro tempore who had, pursuant to stipulation of the parties and order of the Court, been assigned to hear the modification proceedings.

Thereafter, on application of the husband, the wife was adjudicated in contempt of the order of modification because of her refusal to surrender the children to the husband. This order of contempt was made by the same judge pro tempore. There was no stipulation nor order of Court appointing him Judge Pro Tempore to hear this contempt matter.

The Court, after quoting at grant length from *In Re Lake,* 65 Cal. App. 429, at pages 423-425 (224 Pac. 126) said at page 390:

> "It is at once apparent in this case that Commissioner Cochran was not acting as a judge pro tempore by stipulation or appointment and consequently was entirely without jurisdiction to make the order that the wife be committed to jail."

In *Phillips, supra,* the Court said at page 257:

> "A contempt proceeding is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action." (citing cases).

In *Hotaling, supra,* the Court said at page 504:

> "Contempt of Court is a specific criminal offense (citing cases). A contempt proceeding is not a civil action either at law or equity (citing cases), though it may be ancialliary thereto (citing cases), but is a separate proceeding of a criminal nature and summary character (citing cases), in which the

> Court exercises but a limited jurisdiction (citing cases), and in which the people of the state prosecute the action." (citing cases).

There is no inherent power in a Court to place citizens in jail; its jurisdiction in the matter of arrest is limited by the Constitution and statutory enactments.

On page 9 of the opening brief, appellant cites *Pousson v. Superior Court,* 165 Cal. App. 2d 750, for the above proposition. That case is supported by *Silvagni v. Superior Court,* 157 Cal. App. 2d 287, 321 Pac. 2d 15, where the Court said at page 292:

> "Code of Civil Procedure, Section 478, declares that no person can be arrested in a civil action, except as prescribed in this code. * * * There is no inherent power in the Court to place citizens in jail. The Legislature makes the law on that subject within Constitutional limitations. Jurisdiction of Courts in the matter of arrest is limited by the Constitution and statutory enactments."

Contempt proceedings are criminal in nature and should be strictly construed.

> *Butler v. Superior Court,* 178 Cal. App. 2d 763, 3 Cal. Rpt. 180;
>
> *Killpatrick v. Superior Court,* 152 Cal. App. 2d 146, 314 Pac. 2d 164;
>
> *Bennett v. Superior Court,* 99 Cal. App. 2d 585, 593, 222 Pac. 2d 276;

Uhler v. Superior Court, 117 Cal. App. 2d 147; 255 Pac. 26, 29.

It is obvious from the record that Commissioner Boisvert laid a trap for appellant and Commissioner Boisvert was intentionally waiting to spring it. Contempt being a criminal proceeding, appellant was entitled to be informed of his Constitutional rights including his right to remain silent and right to counsel, when asked if he was recording the proceedings. The conduct of Commissioner Boisvert violated the principals of fairness and decency required by Constitutional decisions and therefore violated due process.

For example, see:

Harris v. United States, 382 U.S. 162;

Miranda v. United States, 384 U.S. 436;

Dauglas v. California, 372 U.S. 353;

Escobedo v. Illinois, 378 U.S. 478;

Gideon v. Wainwright, 372 U.S. 335.

In his opening brief appellant cites *In Re Wales,* 153 Cal. App. 2d 117 for the proposition, supported by the foregoing authorities, that Commissioner Boisvert had no jurisdiction to hear the contempt proceeding. Appellees attempt to distinguish *Wales* on the ground that *Wales* was an indirect contempt, whereas this case, appellees say, involves a direct contempt. This is a dis-

tinction without a difference in that the only difference between the two under California law is the mode or procedure of initiating the proceeding.

It is noted that appellees admit (page 5 of appellee's brief) that Commissioner Boisvert erred in holding appellant in contempt.

Appellees say (page 5 of their brief), that the motion to file a cross-complaint would include a motion to modify the pre-trial order. This is not necessarily so. If the motion for leave to file the cross-complaint had been granted, perhaps amendments to the pre-trial order would or would not be in order. Such amendments could be considered in subsequent proceedings for the purpose of considering same.

III

ANSWER TO APPELLEES' POINT III.

Commissioner Boisvert intentionally invoked the contempt. Assuming without conceding, that Commissioner Boisvert ever enjoyed any judicial immunity, he lost it by his deliberate actions.

Appellant believes that *Robichaud v. Ronan,* 351 Fed. 2d 533, is controlling. There this Court said (page 535):

> " . . . We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi judicial capacity, then the reason for this immunity—in integral relationship between

his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of his rights, privileges, or immunities secured by the Federal Constitution and laws. See *Monroe v. Pappe,* 365 U.S. 167. . . To us, it seems neither appropriate nor justifiable, that for the same act, immunities should protect the one, and not the other . . . The trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial role.' If, they, so doing, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to a police activity, as opposed to judicial activity, then the cloak of immunity should not protect them."

Appellant places much weight on *Pierson v. Ray,* 76 S.Ct., 1213. The decision in that case was that judicial immunity would apply to protect the judge. Appellant very strongly urges to this Court that the reason for the ruling is to be found in the following quotation taken from p. 1217:

"We find no difficulty in agreement with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. THE RECORD IS BARREN OF ANY PROOF OR SPECIFIC ALLEGATION THAT JUDGE SPENCER PLAYED ANY ROLE IN THESE ARRESTS AND CONVICTIONS OTHER THAN TO ADJUDGE PETI-

TIONERS GUILTY WHEN THEIR CASES CAME BEFORE HIS COURT." (Emphasis added).

This is our situation, in reverse. The record here is clear and distinct that Commissioner Boisvert did play more than a judicial role. The facts are clear that Commissioner Boisvert was "ready and waiting" for appellant to appear before him. The record is clear that there was a court reporter ready and waiting to report the words said before the Commissioner.

It appears in the record that Commissioner Boisvert, in addition to finding appellant in contempt, found his counsel in contempt. This contempt proceeding was consolidated for hearing in the California District Court of Appeal. In the return of the County to the petition of said counsel for a writ of Habeas Corpus before said court, it is stated that:

> "The Court, informed of the scheduled hearing, *had ordered an official reporter in order to insure a proper record should a contempt order be appropriate.*" (Emphasis added).

This return was signed by Donald K. Byrne, the same attorney, from the County Counsel's Office, who signed appellees' reply brief herein.

The fact in and of itself is enough to prove, without doubt, that Commissioner Boisvert had made up his mind, prior to the time that appellant came before him, that appellant would be doing certain things, and had

made up his mind to take action against appellant at the time of the hearing and to arrange matters so that appellant would be punished and deprived of his civil and constitutional rights, as argued before. Commissioner Boisvert clearly used his powers "to vent his spleen upon others" for a "motive not connected with the public good." Mr. Chief Justice Learned Hand's words in *Gregoire v. Biddle,* 177 F. 2d, 579, clearly recognize the need for some means of punishing a recalcitrant judge who abuses his powers.

IV

CONCLUSION

Appellant respectfully submits:

1. Commissioner Boisvert totally lacked jurisdiction to hear the motion for leave to file the cross-complaint. However, assuming without conceding that he had jurisdiction to hear same, he had absolutely no jurisdiction to rule contempt or hear any matter pertaining thereto.

2. A contempt being a criminal action, even though it arises out of a civil proceeding, a judge pro tempore, duly appointed to hear the civil proceeding only has no jurisidiction to hear a purported contempt arising out of the civil matter.

3. Commissioner Boisvert violated the Constitutional principals of fairness and decency in adjudicat-

ing appellant in contempt without informing him of his Constitutional rights to remain silent and his right to counsel.

4. Commissioner Boisvert stepped out of his purported role of judge pro tempore and acted as a policeman, analogous to the district attorney in the *Robichaud case, supra.*

The judgment appealed from should be reversed and the case remanded for a trial on its merits.

Respectfully submitted:

JESSE A. HAMILTON,
Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JESSE A. HAMILTON,
Attorney for Appellant.